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No. 88-6848

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

LEONARD MARVIN LAWS,

Petitioner,

vs.

BILL ARMONTROUT, Warden, Missouri State Prison

and

THE ATTORNEY GENERAL OF THE STATE OF MISSOURI

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	5
EXHIBIT A	6

TABLE OF AUTHORITIES

	Page
Burger v. Kemp, 483 U.S. 776 (1987)	1, 3
Laws v. Armontrout, 863 F.2d 1377 (8th Cir. 1988) (en banc)	4
Rees v. Peyton, 384 U.S. 312 (1966)	2
Strickland v. Washington, 466 U.S. 668 (1984)	1, 3

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INTRODUCTION

Contrary to Respondents' meager contentions, the case before this Court presents a departure from the established constitutional standard for adequate representation and investigation of mitigating facts in a death penalty case. This Court has not reviewed an adequate representation case since Burger v. Kemp, 483 U.S. 776 (1987). The instant case, however, constitutes a lowering of the standard announced in Burger v. Kemp and places the Eighth Circuit squarely in conflict with the Fifth, Ninth, Tenth, and Eleventh Circuits. Thus, the issue presented here is ripe for review.

Respondent's Brief in Opposition to Petition for Writ of Certiorari demonstrates conclusively why the six judges of the en banc Eighth Circuit who reinstated the death penalty in this case were flat wrong, and why the four judges who voted to set aside the death sentence were correct. The Respondents' Brief is a classic example of a rush to the gallows despite a clear misconstruction and misapplication of law and a dearth of factual support for the en banc majority's opinion. The recounting of the "facts" of trial counsel's investigation of petitioner's background for mitigation has become a veritable fantasy factory, as the tall tales of trial counsel's investigation bear little or no resemblance to the startlingly deficient efforts related by trial counsel at the State Rule 27.26 post-correction hearing.

Finally, respondents have seized upon petitioner's eleventh hour expression of a desire to withdraw his appeal as a reason to deny the certiorari petition - knowing full well that that expression is untested and unanalyzed, as required by this Court's precedents. Respondents' desire to inflict death upon petitioner for his accomplice liability has run afoul of every legal and moral safeguard. The writ should be granted.

A. The Petition for Writ of Certiorari is not "Unauthorized".

The respondents' ongoing battle to exalt expediency over legality is exemplified no more clearly than in their argument that the present petition is unauthorized and that this should be a basis for denial of the writ. Rees v. Payton, 384 U.S. 312 (1966), and cases following it, make clear that under circumstances such as those present here, a competency determination on the record must be made before any credence or effect can be given a death row inmate's expressed desire to terminate his efforts to contest his death sentence.

At any rate, the point is moot. Petitioner has given his express, written consent authorizing appointed counsel to proceed with his case in this Court. The signed, notarized statement of petitioner, dated March 30, 1989, is attached hereto as Exhibit A. Thus, the argument of respondent that the Petition for Writ of Certiorari is unauthorized is moot, and should be given no credence or weight at all by this Court.

B. Respondents' Version of the Facts of Trial Counsel's Investigation of Petitioner's Background is a Fantasy With no Arguable Basis In the Record.

Like the en banc majority before them, respondents cite the appropriate cases for the standard for investigation of mitigating factors set forth in Strickland v. Washington, 466 U.S. 668 (1984) and Burger v. Kemp, 483 U.S. 776 (1987). However, respondents' version of the facts detailing trial counsel's investigation is woven from whole cloth and has little basis in reality.

In the habeas proceedings before the district court, the facts of the investigation were described, as found from the evidence before the district court, which included the transcript of the state post-conviction relief hearing. Those facts are recounted by the district court at page 10 through 13 of its order (Appendix to Petition, pp. A-99 through A-101), and were summarized by Judge McMillian, in his dissent, as follows:

> [Trial counsel] reviewed the 1981 psychiatric examination but did not consider the 1974 psychiatric examination and did not speak to the psychiatrist to determine the significance of appellant's diagnosis, he spoke to a woman he believed to be appellant's stepmother and may have spoken to appellant's mother but couldn't remember their names, and he talked to one (or perhaps two) jurors to determine whether the testimony of community persons in behalf of appellant was effective.

863 F.2d at 1396. It is undisputed that trial counsel never met personally with any of petitioner's relatives. The woman trial counsel believed to be petitioner's stepmother refused over the phone to testify on petitioner's behalf at the penalty phase and said she "knew that other family members did not wish to help." (Supplemental Appendix, Ex. K at pp. 77-78). Then, trial counsel dropped his efforts. He never met personally with any family member, including petitioner's father (although requested by petitioner to do so). There was no testimony that trial counsel's failure to talk further with family members was the result of any kind of strategic decision.

Nor was there any investigation of petitioner's war record. Petitioner told his trial counsel that he had served in Vietnam from 1968-70 and had been honorably discharged. But trial counsel made no further effort to find out about that service or its effect on petitioner. Trial counsel failed to discover petitioner's four service decorations. Incredibly, in closing argument during the investigation phase, trial counsel referred in rambling fashion to his own Vietnam service, but never investigated that of petitioner. Trial counsel's failure to investigate petitioner's war service and its effect on him is even more reprehensible.

Branding this performance "adequate investigation" reduces the Burger v. Kemp standard to nothing. This was not, as respondents' argue, a reasonable investigation. These were not, as respondents have called them, "stubborn relatives" and "sullen relatives [refusing] to cooperate." Respondent's Brief in Opposition at 6. The single telephone call made by trial counsel is not enough. This was not, as respondent has indicated, a case where trial counsel was "aware of petitioner's service in Vietnam." Id. at 5. Just knowing petitioner was there is only the start of the investigation. It is the fact that trial counsel never went any further, never learned about the decorations, never considered the possibility of an argument based on post-Vietnam syndrome that makes this a departure from Burger v. Kemp. Trial counsel not only failed to investigate, he failed to take the steps needed to provide a reasonable basis upon which a strategic decision not to investigate could be made.

C. Respondents Fail to Demonstrate that the Eighth Circuit is Not in Conflict with the Fifth, Ninth, Tenth and Eleventh Circuits.

Respondents have attempted to salvage the "hypothetical rationale" analysis of the majority's opinion by recharacterizing it as a determination of whether the actions of petitioner's trial counsel were subjectively reasonable. This approach, however, fails to overcome the misapplication of the standard of Strickland and Burger and the resulting conflict with four other circuit courts of appeal which have found ineffective assistance of counsel in cases whose facts were extremely similar to those presented here.

Rather than make an attempt to reconcile the Eighth Circuit's decision in Laws v. Armontrout with those decisions of the Fifth, Ninth, Tenth and Eleventh Circuits set forth in the Petition, respondents rely upon the following reasoning:

> Petitioner may be able to line up a list of cases where death-row petitioners received relief. This Court is aware that the State can line up an equally impressive number of cases where the petitioners were denied relief. (Respondent's Brief in Opposition, p. 9).

By such statements, respondents demonstrate their disregard for upholding the constitutional standards established by this Court in Strickland and Burger. Rather, respondents would have the Court treat this case as just another of the cases where a habeas petitioner was denied. Respondents conveniently ignore the fact that petitioner was granted habeas relief by the district court and that four of the ten judges of the Eighth Circuit en banc would also have granted relief.

Respondents' failure to take on the decisions of the other circuits which demonstrate the conflict created by the Eighth Circuit in this case is a tacit admission to the existence of the conflict. Since Burger v. Kemp, numerous inadequate investigation cases have been presented to this Court for certiorari review. Unlike those which have come before, Laws v. Armontrout constitutes a departure from the constitutional principles of Burger and poses a conflict among the circuits on a recurring issue in an area of the upmost constitutional importance - capital murder cases. Should review be denied, Laws v. Armontrout will effectively extinguish the "rational strategic decision" requirement of Strickland and Burger and replace it with a "hypothetical rationale" that need not be founded in fact.

CONCLUSION

For the foregoing reasons, this Court should enter an order granting a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

LEWIS & RICE

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Appearing on the Brief

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Counsel for Petitioner

April 6, 1989

EXHIBIT A

March 30, 1989

I hereby authorize my attorney's, Mr. Barry Short, and cocounsel to proceed with my appeal in the Supreme Court of the United States.

Respectfully
Leonard Laws
C#120

3/30/89

SUBSCRIBED AND SWORN TO BEFORE ME THIS
MAR 30 1989
WITNESS MY HAND AND OFFICIAL SEAL
NOTARY PUBLIC Randall F Mobley

RANDALL F. MOBLEY, NOTARY PUBLIC
STATE OF MISSOURI, COLE COUNTY
MY COMMISSION EXPIRES OCT. 29, 1990